Chapter XXVII

GENERAL ELECTION CASES, 1850 TO 1860.

821. The Pennsylvania election case of Wright v. Fuller, in the Thirty-second Congress.

Construction of the provision of the law of 1851 requiring the notice of contest to "specify particularly."

The notice of contest need not specify the names of voters objected to as not qualified.

On April 22, 1852,[2] the Committee on Elections reported in the case of Wright *v.* Fuller, of Pennsylvania. This case involved three main features: The sufficiency of the notice of contest under the law of 1851, the conduct of election officers, and alleged fraudulent votes.

The sitting Member alleged that the notice was not in accordance with the requirement that the contestant should "specify particularly" the grounds of the contest. The minority and majority of the committee differed in their interpretation of the law. After printing in full the notice, the majority report contends:

A majority of the committee deeming this notice sufficiently certain and definite to apprise the sitting Member of the reasons "of the grounds" on which his election was contested, overruled this objection. The first section of the law which directs the contestant to give notice to the sitting Member reads in conclusion thus: "And in such notice shall specify particularly the grounds upon which he relies in the contest." What are the "grounds," the reasons on which the seat is to be contested? The notice furnishes us with the answer: The gross and flagrant misconduct and irregularities of the officers constituting the election board, and also the reception of such a number of illegal votes as changed the

[1] Additional cases in this period, classified in different chapters, are:
Thirty-fourth Congress, Tumey *v.* Marshall and Fouke *v.* Trumbull, Illinois. (See. 415.)
Thirty-fifth Congress, Fuller *v.* Kingsbury, Dakota. (See. 408.)
Thirty-fifth Congress, Whyte *v.* Harris, Maryland. (See. 324.)
Thirty-fifth Congress, Phelps, Cavanaugh, and Becker, Minnesota. (Sec. 519.)
Thirty-fifth Congress, Vallandigham *v.* Campbell, Ohio. (Sec. 726.)
Thirty-sixth Congress, Williamson *v.* Sickles, New York. (Sec. 597.)
Thirty-sixth Congress, Harrison *v.* Davis, Maryland. Sec. 325.)

[2] First session Thirty-second Congress, House Report No. 136; 1 Bartlett, p. 152; Rowell's Digest, p. 137.

result of the election. The intention of the law requiring this notice to be given was to prevent any surprise being practiced, to put the sitting Member upon a proper defense. As no surprise has been alleged-no want of due information protested—the committee could but conclude that the notice, within the purview of the law, was all sufficient. If, as the sitting Member contends, the act required that the names of the illegal voters should have been particularly specified in the notice, we would certainly have the fact set forth and declared in the sixth section, which provides that the "names of the witnesses to be examined, and their places of residence, should be given, by leaving a copy with the person to be notified, at his usual place of abode, at least ten days before the examination." The furnishing of a list of names of the illegal voters might possibly have put the sitting Member in a stronger position to rebut the contestant's proof; but that the contestant was required to furnish such a list is not within the letter nor demanded by the spirit of the statute.

The minority, who from their views evidently considered that on this point the case turned principally, contended:

Now what do the words "specify particularly," in this connection, mean? In our opinion they mean a clear, precise, definite, and full statement of the facts on which an election is proposed to be contested. The charges must be positive, tangible, direct, and particular. If a party complain of illegal voting, therefore, inasmuch as illegal voting is susceptible of particular specification, he must state where it was done, when it was done, the number of illegal votes, and by whom given, and the disqualification. Clearly nothing less would be "a particular specification," and the absence of any of these requisites must render such specification vague, indefinite, and therefore insufficient. The notice of the contestant in this case does not state the number or the names of any who voted illegally, and is, therefore, in our judgment, insufficient. It should state the number, because any number less than the returned Member's majority would not, of course, defeat his election; and an investigation of any less number would, therefore, be unnecessary. A general allegation of illegal votes may mean five, or ten, or twenty, or five hundred; it is uncertain, and not particular. Nor would a subsequent averment that the illegal votes received, and the illegalities complained of, had changed the result, be sufficient. This point was expressly ruled in case of Lelar, sheriff of Philadelphia, in 1846. The courts say they will require of the party complaining of illegal votes to state the number, for instance, thus: Twenty voted under age; fifteen voted who were unnaturalized foreigners; ten who were nonresidents, etc. This particularity the courts of Pennsylvania say they will require, because otherwise they would be converted into a mere election board, for the purpose of counting disputed ballots. It is true that in this case they did not require the names, but Congress, in the case of Joseph B. Varnum, of Massachusetts (see Contested Elections, p. 112), expressly ruled that the allegation that persons vote who were not qualified to vote is not sufficiently certain, and that the name of the persons objected to for want of sufficient qualification must be set forth prior to the taking of the testimony.

Again in the case of Easton *v.* Scott, from Missouri (see Contested Elections, p. 272), it was decided that the party complaining of illegal votes must state the names and the particular disqualifications. This was also required in the case of Littell against Robbins, at the last Congress. It has always been required in the English House of Commons. Such, we believe, is the usual and correct practice in all cases of contested elections; and surely if Congress, in the absence of any law prescribing the mode of taking testimony in such cases, has required parties to be thus particular, how can we be less so when Congress by positive law declares they shall "specify particularly?"

822. The case of Wright v. Fuller, continued.

The House, in judging on election, returns, and qualifications, should, by reason of the functions delegated to the States, be governed by certain State laws.

Discussion as to what constitutes a fatal irregularity in the conduct of election officers.

The Elections Committee, in an unsustained report, held that a seat should be declared vacant for a fraud which might have reversed the result.

Not knowing who profited by certain decisive votes cast by disqualified voters, the House hesitated to declare the seat vacant.

As to the conduct of the election officers and the fraudulent voting, the majority lay down this rule of conduct:

Having disposed of this preliminary point, the committee proceeded to the examination of the law and testimony involved in this case. In discharging the last duty, the committee considered that, although the House of Representatives, by virtue of the fifth section of the first article of the Federal Constitution, are made the judges of the election, returns, and qualifications of its Members, yet this power is not plenary, but is subordinate to the second and fourth sections of the same article—the first of these sections providing that the electors of the Members shall have the qualifications requisite for the most numerous branch of the State legislature; the fourth section empowering and authorizing the legislature in each State to prescribe the places, times, and manner of holding elections for Senators and Representatives—such regulations being subject to alterations made by the Congress.

By force of these provisions, the House is compelled, when adjudicating in any matter affecting the elections, returns, or qualifications of any of its Members, to make the law of the respective States from which such Members may be returned its rule of action.

In relation to the conduct of election officers the majority found that at the Danville precinct, where the vote was suspicious—

The evidence furnished the committee proves that the judge, Mr. Kitchen, elected by the people to officiate in the particular capacity of judge, did, for a great portion of the time while the election was going on, neglect his peculiar business and was engaged in discharging the duty of inspector. Not only the oath but the duties of these officers are entirely different. The two inspectors are required to stand at the window to receive votes, and whenever they may disagree respecting the qualifications of a voter the judge is to decide between them. His duty is strictly that of an umpire. His oath carries no further obligation with it. Usurping the duties of an inspector, he was, pro hac vice, an unsworn officer. If this irregularity of conduct of the judge could be considered as resulting from ignorance or casual carelessness, it might not demand the serious attention of the House, but this was not the case.

Each inspector is required to select one clerk, whose duties, as prescribed by law, are to keep the list of voters as voting, and to record the reasons of persons voting on age, or such as are not found on the alphabetical list, and as admitted by the inspectors, and who are bound by the obligations of an oath. E. W. Concklin and B. Brown were selected to act in this capacity. Do we find them more regardful of duty, more faithfully observant of the requirements of the law? The evidence is strong that one of them, Concklin, while he delegated to another individual, an unsworn officer, a right to discharge his duties, assumed for a portion of the time the office of inspector. It is proven that Concklin was engaged in taking and counting out votes from the boxes—a duty which is imposed by the law exclusively upon the judge and inspectors.

The assessor was also required by law to be present to give information as to the right of persons to vote; but at the Danville precinct the assessor laid aside his register and acted for a time as distributer of tickets.

The majority therefore concluded that the action of the election officers was fatally at variance with the requirements of law.

The minority contended that the acts of the election officers were not fatally illegal. The judge was sworn to "faithfully assist the inspectors," among his other duties, and the minority concluded that this justified the acts of Judge Kitchen.

The minority contended that the proof of illegal voting was insufficient. The majority showed that the total result at the Danville precinct, where contestant received 32 votes and sitting Member 659, was suspicious when compared with votes of previous elections. Furthermore, certain voters whose qualifications were impeached refused to answer subpoanas and so defied investigation. On the whole, the testimony satisfied the majority that frauds had been committed; but they

could not satisfy themselves as to how many illegal votes the sitting Member received. The sitting Member had been returned by a majority of 59 votes, and the committee found enough unqualified voters to reverse the result if it could have been definitely ascertained that all or a large portion of them had been cast for sitting Member. Not being able to establish this positively, the committee reported a resolution declaring the seat vacant because the election at the Danville precinct had been "irregularly and illegally conducted."

The case was considered in the House June 24, 26, and 28 and July 2.[1] On the latter day the whole subject was laid on the table, by a vote of yeas 87, nays 64.

So the sitting Member retained the seat.

823. The election case of Lane v. Gallegos, from the Territory of New Mexico, in the Thirty-third Congress.

In the absence of fraud on the part of the voters, whose choice was in doubt, the House overlooked irregularities on the part of the election officers.

On February 24, 1854,[2] the Committee on Elections reported in the case of Lane *v.* Gallegos, of New Mexico, that there were undoubtedly great irregularities in the returns, but no greater than might be expected in the recently organized Territory, where the people generally did not understand the institutions or language of the country. It did not appear that in any single instance was fraud committed or attempted, or that any return from any of the precincts was corruptly made.

The contestant alleged gross frauds in the voting and that returns had been changed in the office of the secretary.

The committee found that the votes of certain Indians had been properly excluded, since they were not qualified voters according to the laws of the Territory. There was no proof showing material fraud in the voting.

The probate judge of San Miguel County, in returning the abstract of votes of certain precincts to the office of the secretary of the Territory, had failed to accompany his return with the poll book. But subsequently, and within the limit of time prescribed by law, the lists of voters were furnished.

The committee concluded:

> Neither in these precincts of San Miguel nor in those of any other county from which the returns are alleged by the contestant to be informal and contrary to law have the committee been able to perceive so substantial a defect as to justify their total exclusion. In the absence of all attempt at fraud on the part of the voters it would be manifestly unjust to deprive them of the effect of their suffrages for a slight failure upon the part of the officers conducting the election fully to comply with all the forms of law when enough is clearly shown to determine the wishes of the people.

Therefore the committee arrived at the unanimous opinion that Mr. Gallegos was entitled to the seat as Delegate from New Mexico.

The House concurred in the report of the committee.

824. The Illinois election case of Archer v. Allen in the Thirty-fourth Congress.

Opinion from a divided committee as to the degree of definiteness of specifications required in a notice of contest.

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[1] Journal, pp. 840, 845, 849, 852, 857–859; Globe, pp. 1613, 1627, 1655.

[2] First session Thirty-third Congress, 1 Bartlett, p. 164; Rowell's Digest, p. 140.

A notice as to taking testimony having been delayed in delivery so that one of the parties could not attend, the committee ordered the testimony taken anew.

When a Member was returned by a majority of 1, which was rendered uncertain by a recount, the House declared the seat vacant.

As to the effect of an unofficial recount of votes on the return as originally made.

A seat being declared vacant, the House directed the Speaker to notify the executive of the State.

The case of Archer *v.* Allen, from Illinois, in 1856,[1] involved four questions: The sufficiency of the notice of contest under the law, the sufficiency of a notice of the taking of certain testimony, the legality of a recount of votes in a certain precinct, and the legality of three votes.

The contestant had notified the sitting Member of his intention to contest on the following grounds:

> That the returns made by the returning officers, as officially announced, are incorrect, and that the poll books of the several counties in this district show that I received a majority of the legal votes polled in the said district for the said office and am entitled to the certificate of election therefrom.

The majority of the committee concluded this notice was sufficient:

> Your committee are dearly of opinion that the first specification is sufficiently certain and definite to authorize an investigation of the correctness of the returns made by the returning officers of any precinct in the district. The notice embraced all the precincts in general terms, and was as good a compliance with the law of 1851[2] and as serviceable to the sitting Member as if every precinct in the district had been specifically named. The law was substantially complied with. Besides, it does not appear, and it has not been suggested, that injury or inconvenience has resulted to the sitting Member from any want of certainty in the notice.

The minority contended that the notice fell far short of the requirement of law, that the contestant should "specify particularly the ground upon which he relies in the contest," and declared that it could hardly have been more vague and indefinite.

The second consideration related to the taking of testimony as to the return of Livingston precinct, on which depended the seat. The sitting Member objected that the notice given him was not due or legal. The law required ten days' notice; but it was not until February 28 that the notice was served on him in Washington, and the time for taking the testimony was designated as March 9, and the place the State of Illinois. The minority of the committee contended that the time was but nine days, and the distance too great to allow of attendance. Therefore the testimony was ex parte and should not be allowed to impeach the Livingston vote as returned originally. The majority of the committee contended that the notice which was dated February 20, and delayed by no fault of contestant, was sufficient under the rule of law that the day upon which the notice was given might be counted under certain circumstances, and on the further ground that the law relating to

[1] First session Thirty-fourth Congress, 1 Bartlett, p. 169; Rowell's Digest, p. 142; House Reports Nos. 8 and 167.

[2] 9 Stat. L., p. 568. The prior laws on this subject were Stat. 1798, chap. 8, and Stat. 1800, chap. 28, which extended the former act for four years.

contests was directory and cumulative, having for an object the protection and not the defeat of contesting parties and the people. But the committee decided to have the depositions retaken at a time and place where the sitting Member could be present and cross-examine. The sitting Member availed himself of this privilege, although he had expressly denied that the depositions, as originally taken, contained anything that. could warrant the committee in setting aside the official returns.

At the election held November 7, 1854, the returns showed for the sitting Member a majority of one vote. The return of Livingston precinct was 100 votes for William B. Archer and 47 votes for James C. Allen.

But on March 2, 1855, the election officers of Livingston made affidavit that a recount of the votes—which had been put in a locked box and kept by one of the judges—showed 102 votes for Mr. Archer and 46 votes for Mr. Allen.

The majority of the committee were satisfied with the correctness of the recount, the three original ballots which occasioned the discrepancy having been exhibited to the committee, although they were lost before the subject came up in the House. The minority held that the correctness of the recount was not proven. There was no law requiring the ballots to be kept after the first count and return. The testimony was not conclusive that other persons than the judge keeping the box had not had access to it.

There was also a question as to three votes, two alleged to have been cast by minors and one by a nonresident. The testimony as to the two alleged minors was not sufficient to determine for whom they cast their ballots. The alleged nonresident testified that he voted for contestant, but the majority of the committee declined to rule that he was ineligible as a voter, as it was "to be presumed that the judges of election did their duty and received no illegal votes."

Therefore the majority reported the following resolution:

Resolved, That James C. Allen was not elected and is not entitled to a seat in this House.
Resolved, That William B. Archer was elected and is entitled to a seat in this House.

On July 16, 17, and 18 [1] the report was considered in the House, and after long debate the first resolution was agreed to, yeas 94, nays 90.

By the second resolution, declaring Mr. Archer elected, the yeas were 89 and the nays 91. So the contestant was not seated, although a persistent effort was made to reconsider the vote.

Then the House agreed to the following:

Whereas this House having declared that neither James C. Allen nor William B. Archer is entitled to a seat on this floor from the Seventh Congressional district of Illinois;

Be it resolved, That in the judgment of this House, a vacancy exists in said district, and that the election which was contested in this House therefrom be referred back to the people of the district, and that the Speaker of this House notify the governor of that State of this resolution of the House.

825. The first election case of Reeder v. Whitfield, from the Territory of Kansas, in the Thirty-fourth Congress.

Instance wherein an election contest was instituted by memorial after the enactment of the law of 1851.

[1] Journal, pp. 1221, 1223, 1226–1234; Globe, pp. 1646, 1656; Appendix, pp. 923–936.

In 1856 the idea was advanced that the House was not bound to proceed in an election case according to the law of 1851.

On February 2, 1856, the House elected a Speaker after a contest which had begun December 3, 1855.

On February 4, 1856,[1] after the oath had been administered to the Members, the Delegates were called. When the name of John W. Whitfield, of Kansas, was called, Mr. Lewis D. Campbell, of Ohio, expressed the belief that the circumstances surrounding the election of Mr. Whitfield were sufficient to cause the House to depart from its usual custom in admitting Delegates on prima facie evidence; but as the House had been long delayed in organizing, and as a Delegate had no vote, he would not object to the swearing in of Mr. Whitfield. The latter then took the oath.

On February 14[2] the memorial of A. H. Reeder, contesting Mr. Whitfield's seat was presented to the House. The grounds of contest were as follows:

That the election of October 1, 1855, at which Mr. Whitfield was returned as elected, was void, inasmuch as the law under which it was held had been passed by a legislature elected through the participation of superior numbers of nonresidents of the Territory.

That the law had been passed by the legislature sitting at an unauthorized place, where no valid legislation could be had.

That the election for Delegate had not been conducted according to the forms of that pretended law, even; and that many illegal votes were polled by nonresidents and others. The memorialist excused himself from further specifications on this objection because he could not obtain the necessary information from the executive offices of the Territory.

The memorialist further claimed that he was elected Delegate by a large majority of the legal voters at an election held October 9, 1855.

This memorial was referred, and on March 5, 1856,[3] the Committee on Elections reported. The committee in this report did not go into the merits of the case but asked the adoption of the following resolution:

Resolved, That the Committee on Elections, in the contested election case from the Territory of Kansas, be, and are hereby, empowered to send for persons and papers, and to examine witnesses upon oath or affirmation.

It appeared from the memorial that Mr. Reeder did not claim the seat; but this was not seriously urged as an objection to proceedings by the House, which was conceded to have undoubted authority to examine its own constituent parts. The majority of the House also considered that common rumor, as well as the declarations of the memorialist, furnished abundant reasons for the investigation.

A preliminary question of importance was involved in the fact that the proceeding by the contestant were not in accordance with the law of 1851 governing procedure in cases of contested elections. That law, while in terms applying to States only, was said to apply by implication also to contested elections from the Territories. But it was argued,[4] apparently with prevailing effect, that even if it did apply to Territorial contests, the law of 1851 could not prevent the House, under the Constitution, from passing such orders and resolutions to procure testimony whether by witnesses or deposition, as it might think proper.

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[1] First session Thirty-fourth Congress, Globe, p. 353; Journal, p. 448.

[2] Journal, p. 533; House Report No. 3, p. 26.

[3] House Report No. 3.

[4] By Mr. Israel Washburn, of Maine, Globe, p. 454.

The right of the House to send for persons and papers in such a case was not seriously questioned, the precedents in the New Jersey contest, and earlier cases in the First and Second Congresses being cited.

826. The first case of Reeder v. Whitfield, continued.

The House decided that it might investigate all matters pertaining to the election of a Delegate, including the constitution of the legislature which provided for the election.

Form of resolution providing for the Kansas investigation of 1856.

Discussion of the nature of the office of Delegate.

A Territorial legislature being chosen under duress of armed invaders, the House unseated the Delegate chosen under a law passed by that legislature.

The main point not being a question as to which of the two parties to the contest received the most votes, but a question as to the validity of the legislative act providing for the election, it was contended that Mr. Reeder was estopped from raising this question because he was governor of the Territory at the time the legislature was elected and assembled, and issued to the Members their certificates of election, and treated the legislature, when assembled, as a lawful body. The majority of the committee contended that the doctrine of estoppel was applicable only to matters of private right, and an official acting in a public capacity could not, by the performance of his duty, thereby estop himself from any other duty which he might afterwards owe to the public as a private citizen, or in another and different official capacity.

These questions were incidental to the main controversy, as to the right of the House to examine into the legality of the existence of the Territorial legislature which had passed the law, in accordance with which Mr. Whitfield had received the election and return.

It was urged with great vigor[1] that the House might not make this inquiry, since the House in this case was in the position of a court, and while a court might inquire into the validity of a statute, it might not inquire into the legality of the election of the members of the legislature that passed the statute. That question belonged to the two houses of the legislature itself, and their decision when made was considered the judgment of a court of competent jurisdiction, which no other court would inquire into. It was the inherent right of the Kansas legislature to inquire into the election, returns, and qualifications of its own members, and having done so the National House of Representatives might not examine that subject. This position was fortified by numerous citations from the law writers of England.

In support of the committee's proposition it was argued[2] that it did not follow that this House was bound by the limitations of a court. A judicial tribunal might not examine into the elections, qualifications, and returns of Members of this House, but this House did decide on those questions. It did not follow, therefore, that this

[1] By Mr. Alexander H. Stephens, of Georgia, and others. See Appendix of Globe, first session Thirty-fourth Congress, pp. 120, 121, 179.

[2] By Mr. Henry Winter Davis, of Maryland. (Appendix of Globe, p. 227.) Mr. Davis occupied a middle ground, not going to the whole extent of the committee's contention.

House might not decide a question because the courts could not. The question before the House was not a judicial question, but a political question. This distinction cleared away the difficulties over this branch of the question. This House having the right to examine into the election of its Members,[1] had the power to look into every fact upon which the election depended. There was no object in citing authorities as to the right of a legislature to judge of the election, returns, and qualifications of its members, because there was a prior question first to be decided, viz, whether or not there was a legislature to judge. Even in the case of a State one of the branches of Congress had passed upon a status of the legislature in the contested election case in the Senate of Robbins and Potter.[2] But the Territorial legislature of Kansas did not stand on any such basis. Its authority was limited by the terms of the organic law passed by Congress—the Kansas and Nebraska act. That legislature was not only a usurping body, elected by violence, but its legislation in regard to the election of a Delegate to Congress violated the organic act, notably in that it presumed to delegate powers which it might not delegate.

The question of the legality of the removal of the legislature to another place, as well as the validity of the election of October 9, when Mr. Reeder was chosen, did not figure essentially in the report or debate.

The preliminary report of the committee was debated on February 19, 20, March 6, 7, 14, 17, 18, and 19.[3] On February 20 the House agreed to the resolution by a vote of 71 yeas to 69 nays, but at once reconsidered it by a vote of 75 yeas to 67 nays. The resolution was then recommitted, with instruction to report the reason and grounds for which the authority to send for persons and papers was asked. On March 6 the House took up the subject again, the committee having reported the reasons and the same resolution.

Several propositions were then made as substitutes for the resolution of the committee, and finally, on March 19,[4] the House, by a vote of 102 yeas to 93 nays, adopted the following resolution:

Resolved, That a committee of three of the Members of this House, to be appointed by the Speaker, shall proceed to inquire into and collect evidence in regard to the troubles in Kansas generally, and particularly in regard to any fraud or force attempted or practiced in reference to any of the elections which have taken place in said Territory, either under the law organizing said Territory or under any pretended law which may be alleged to have taken effect therein since; that they shall fully investigate and take proof of all violent and tumultuous proceedings in said Territory at any time since the passage of the Kansas-Nebraska act, whether engaged in by residents of said Territory or by any person or persons from elsewhere going into said Territory and doing, or encouraging others to do, any act of violence or public disturbance against the laws of the United States or the rights, peace, and safety of the residents of said Territory; and for that purpose said committee shall have full power to send for and examine, and take copies of all such papers, public records, and proceedings, as in their judgment will be useful in the premises; and also to send for persons and examine them on oath or affirmation as to matters within their knowledge touching the matters of said investigation; and said committee, by their chairman, shall have power to administer all necessary oaths or affirmations connected with their aforesaid duties.

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[1] Argument of Mr. Israel Washburn, of Maine. Appendix of Globe, p. 191.

[2] Arguments of Messrs. J. A. Bingham, of Ohio, and Washburn, of Maine. Appendix of Globe, pp. 126, 192.

[3] Journal, pp. 561, 568, 646, 650, 678, 685, 691, 693; Globe, pp. 451, 475, 611, 612, 659, 674, 677, 690; Appendix, pp. 118, 122, 166, 179, 189, 227.

[4] Journal, p. 698.

Resolved, further, That said committee may hold their investigations at such places and times as to them may seem advisable, and that they have leave of absence from the duties of this House until they shall have completed such investigation; that they be authorized to employ one or more clerks, and one or more assistant sergeants-at-arms, to aid them in their investigations; and may administer to them an oath or affirmation faithfully to perform the duties assigned to them, respectively, and to keep secret all matters which may come to their knowledge touching such investigation as said committee shall direct, until the report of the same shall be submitted to this House; and said committee may discharge any such clerk or assistant sergeant-at-arms for neglect of duty or disregard of instructions in the premises, and employ others under like regulations.

Resolved, further, That if any person shall in any manner obstruct or hinder said committee, or attempt so to do, in their said investigation, or shall refuse to attend on said committee, and to give evidence when summoned for that purpose, or shall refuse to produce any paper, book, public record, or proceeding in their possession or control to said committee when so required, or shall make any disturbance where said committee is holding their sittings, said committee may, if they see fit, cause any and every such person to be arrested by said assistant sergeant-at-arms and brought before this House to be dealt with as for a contempt.

Resolved, further, That for the purpose of defraying the expenses of said commission there be, and hereby is, appropriated the sum of $10,000, to be paid out of the contingent fund of this House.

Resolved, further, That the President of the United States be, and is hereby, requested to furnish to said committee, should they be met with any serious opposition by bodies of lawless men, in the discharge of their duties aforesaid, such aid from any military force as may at the time be convenient to them, as may be necessary to remove such opposition and enable said committee without molestation to proceed with their labors.

Resolved, further, That when said committee shall have completed said investigation they report all the evidence so collected to this House.

Messrs. John Sherman, of Ohio; William A. Howard, of Michigan; and Mordecai Oliver, of Missouri, were appointed on this committee, and conducted the investigations as ordered. On July 2, 1856,[1] the report was referred by the House to the Committee on Elections.

On July 24[2] the Committee on Elections reported.[3] The majority found that each election in Kansas held under the organic or alleged Territorial law had been carried on by organized invasion from Missouri, which had prevented the people of Kansas from exercising their rights; that the alleged Territorial legislature was illegally constituted, and its enactments null and void; that the election of Mr. Whitfield was not in pursuance of valid law, and should be regarded only as the expression of the choice of those resident citizens who voted for him; that the election of Mr. Reeder was not held in pursuance of law, and was the expression only of resident citizens who voted for him; and that Mr. Reeder received a greater number of the votes of resident citizens than did Mr. Whitfield.

Therefore the majority reported resolutions to unseat Mr. Whitfield and seat Mr. Reeder.

As to the propriety of seating Mr. Whitfield the majority say:

The office of a Delegate from a Territory is not created by the Constitution. Such Delegates are not Members of the House, and have no votes in its deliberations. They are received as a matter of favor—as organs through whom may be communicated the opinions and wishes. of the people of the Territories. It is competent for the House—and this power has been often exercised—to admit private parties to be heard before it by counsel. It must be equally competent for the House, at its discretion, to admit any person to speak in behalf of the people of the Territories. It may, if it sees fit, admit more than one such person from each Territory. Under ordinary circumstances, no case calling for the exer-

[1] Journal, p. 1148.

[2] Journal, p. 1275.

[3] House Report No. 275.

cise of this discretionary power will arise. In all the laws creating Territories provision is made for the election of Delegates to Congress; and the people of the Territories, having the opportunity to be heard through such Delegates, and by memorial and petition under the general provisions of the Constitution, could not ask to be heard through any other agency. In the present case, however, the people of the Territory of Kansas have been deprived of the power to make a strictly legal election of a Delegate by an invasion from Missouri, which subverted their Territorial government and annihilated its legislative power. To deny to Kansas the right to be heard through the choice of its resident citizens, merely because that choice was manifested outside of legal forms, and necessarily so, because the law-making power was destroyed by foreign violence, is to deny to Kansas the right to be heard at all on the floor of the House.

The minority contended, in a report apparently drawn by Mr. Alexander H. Stephens, of Georgia, that the question was the same as before the report of the investigating committee, that all question as to the validity of the law passed by the Kansas legislature was res adjudicata according to the well-settled principles of all our representative institutions. The minority also called attention to a letter alleged to have been written by the contestant and laid before the House in the report of the investigating committee, wherein he admitted the legality of the legislature. The minority denied the charges of outrages in Kansas, while at the same time denying the power of the House to give them weight in this case had there been such.

On July 31 and August 1[1] the report of the committee was debated. In the course of this debate, by unanimous consent, a statement of the contestant was read by the Clerk at the desk.[2] On August 1, by a vote of yeas 110, nays 92, the House agreed to the resolution declaring Mr. Whitfield not entitled to the seat.

On the resolution to admit Mr. Reeder to a seat there were yeas 88, nays 113. So the seat became vacant.

827. The second election case of Reeder v. Whitfield, from the Territory of Kansas, in the Thirty-fourth Congress.

The House declined to reverse its conclusion that a Delegate, elected in pursuance of a law enacted by an illegally constituted legislature, should not retain his seat.

When the organic law requires an act of the legislature to fix the times, etc., of a Territorial election, an election called by the governor is not valid.

A Territorial legislature of impeached status having by a law virtually disfranchised qualified voters, the Elections Committee considered the status of the returned Delegate adversely affected.

The integrity of the laws governing the election being impeached, the committee recommended that the seat be declared vacant.

On February 12, 1857,[3] the Committee on Elections reported in the contested election case of Reeder *v.* Whitfield, from Kansas. This was a second contest. At the first session of this Congress Mr. Whitfield had been unseated.[4] At the third session Mr. Whitfield again appeared with the certificate of the governor of the

[1] Journal, pp. 1333, 1337–1340; Globe, pp. 1758, 1842, 1859, 1863, 1873; Appendix, p. 1114.

[2] Journal, p. 1333.

[3] Third session Thirty-fourth Congress, 1 Bartlett, p. 216; Rowell's Digest, p. 149; House Report No. 186.

[4] See Section 826 of this volume.

Territory, and, after opposition, was sworn in on the prima facie evidence of the certificate.[1]

In the report on this second contest the committee say:

> The sitting Delegate * * * bases his claim to his seat upon an election held in October, 1856, in pursuance of a proclamation fixing the day of the election, issued by the governor * * * and which said election was conducted according to "An act to regulate elections," enacted in 1855, by a body of men claiming to be the legislature of Kansas, and which derived its existence from an election held in that Territory on March 30, 1855. It appears from the report of the special committee, appointed by this House during its first session, to investigate the affairs of Kansas, that the Territorial legislature, claiming to have been chosen at the election of March 30, 1855, "was an illegally constituted body, and had no power to pass valid laws, and their enactments are, therefore, null and void." In this conclusion of the special committee this House has manifested its own concurrence by many decisions and on many occasions. * * * It is a fatal objection, therefore, to the claim of the sitting Delegate to have been elected in pursuance of law, that he bases it upon an election held under the direction of officers deriving their authority from an usurping legislative body, and regulated by laws emanating from the same vicious sources.

The minority of the committee denied that these assertions of the majority had been proven, and maintained that the legislature in question was legal, elected by a majority of the actual bona fide settlers or residents of the Territory.

The majority of the committee further contended that there was another fatal objection to the claim of the sitting Delegate to the seat. The organic act of the Territory—the Kansas-Nebraska act of 1854—provided that the first election for a Delegate to Congress should be held in accordance with the precept of the governor, but that "at all subsequent elections the times, places, and manner of holding the elections shall be prescribed by law." Therefore the governor of Kansas was not authorized by the organic law to issue the proclamation for the election of October, at which the sitting Delegate claimed to have been elected. Neither was there to be found such authority in the law enacted by the so-called legislature. The minority did not assent to this proposition, contending that the organic act secured to the people of the Territory the right to representation, and they "should not be held to have lost this high privilege merely because the Territorial legislature omitted to pass an act prescribing the 'times, places, and manner of holding the elections.'" The unseating of the Delegate at the preceding session had left a vacancy, and to carry out the spirit of the organic law and keep a Delegate in Congress it resulted, from the very necessity of the case, that it was the duty of the governor to issue the proclamation for the election. Such a construction of the organic act as the majority contended for would have left the Territory without representation had the legislature failed to pass a law prescribing "the times, places, and manner of holding the elections." The minority also claimed sanction for the act of the governor in the law of 1817, which provided that every Territory in which a temporary government had been established should have the right to send a Delegate to Congress, such Delegate to "be elected every second year, for the same term of two years for which Members of the House of Representatives of the United States are elected."

The majority of the committee say that, while the sitting Delegate had no legal claim to the seat, he might as a matter of "indulgence and discretion" be

[1] See Section 529 of this volume.

allowed to retain the seat if it sufficiently appeared that his election was in fact concurred in by a majority of those who were or ought to be the legal voters of Kansas. But the committee found that the act of the "pretended legislature" under which the election was held had certain provisions in regard to the choice of election officers and the qualifications of voters that virtually disfranchised large numbers of the citizens of Kansas and permitted reckless nonresidents to exercise the suffrage. The majority were of the opinion that several hundred persons were restrained from voting by what was in effect a "test oath."

The majority stated they were not prepared to recommend that the contestant, Mr. Reeder, be admitted to the seat, it not being contended that he had received the greater number of votes cast at the election in question.

The majority of the committee recommended the following resolution:

Resolved, That John W. Whitfield is not entitled to a seat in this House as a delegate from the Territory of Kansas.

On February 21 [1] the resolution was taken up and a motion to lay it on the table was agreed to, yeas 96, nays 87. An attempt was at once made to reconsider this vote, but the motion to reconsider was laid on the table, yeas 99, nays 94. From the slight debate it appears that there was a disposition to table the subject in order to attend to other business in the closing hours of the session; and that the vote did not strictly involve the merits of the question.

828. The Maine election case of Milliken v. Fuller in the Thirty-fourth Congress.

The returns of election officers de facto, acting in good faith, were counted by the House.

Instance wherein returns were held valid although there were serious irregularities on the part of the returning officers.

On April 10, 1856,[2] the Committee on Elections reported in the case of Milliken *v.* Fuller, of Maine, recommending the following resolution, which was agreed to by the House without debate or division:

Resolved, That Thomas J. D. Fuller is elected to, and rightfully entitled to, his seat in the Thirty-fourth Congress.

The report of the committee says that they did not investigate alleged defects in ballots—

for the reason that, whether so allowed or not, the result would not thereby be changed, unless—

First. That votes from "plantations organized for election purposes only," from which lists of the voters were not returned to the office of the secretary of state, as is contended the law required as a condition to being allowed, be rejected; or,

Second. That the votes of Hancock plantation be rejected, because the officers who held the election were chosen at a meeting held in the month of April, when, as the contestant contends, the law of the State required that it should have been held in the mouth of March.

There is no controversy about the facts in either case, and although there was difference of opinion in the committee, whether the election of municipal officers in the Hancock plantation was held at a time permitted by the law of the State, yet the committee is unanimously of the opinion that the persons

[1] Journal, p. 509; Globe, p. 798.

[2] First session Thirty-fourth Congress, 1 Bartlett, p. 176; Rowell's Digest, p. 143; House Report No 44; Journal, p. 903.

officiating were officers de facto, acting in good faith; and, as no fraud is alleged, the votes from the district were rightfully counted for the sitting member.

In regard to the returns from "plantations organized for election purposes only," the members of the committee were, as were the governor and council of the State of Maine before them, divided in opinion, and are not prepared to say what conclusion they would have come to in the case, had this been an original question; but, inasmuch as contemporaneous constructions by the State canvassers have recognized the returns from these plantations, and that they have received and counted them as valid, notwithstanding the list of voters was not returned with the number of votes cast; therefore, under the circumstances, the committee do not feel authorized, whatever the opinion of some of its members may be of the effect of a noncompliance on the part of the plantation officers with the plain requirements of the law, to exclude the votes of these plantations.

829. The election case of Bennet v. Chapman, from the Territory of Nebraska, in the Thirty-fourth Congress.

Discussion of the extent of irregularities in returns required to justify their rejection.

Discussion as to residence within the limits of the constituency as a qualification for voters.

Instance wherein the report of the Elections Committee was overruled by the House.

On April 18, 1856,[1] the Committee on Elections reported in the case of Bennet *v.* Chapman, from the Territory of Nebraska. This case involved two varieties of question: One as to the returns, and the other as to the qualifications of certain voters.

A count of all the votes cast at the election gave the contestant a plurality of 13 votes. But the Territorial canvassers and governor rejected the returns from half the counties of the Territory, affecting nearly half of the total vote. As a result of this action, a plurality resulted for the sitting Member.

The returns were rejected because they were not made in accordance with the Territorial law. The majority of the committee considered that these variations were not sufficient to cause the rejection of the returns, in the absence of anything impeaching the integrity of the vote. The minority contended that the deviations from the requirements of the statutes were sufficient to make the returns fatally defective.

The deviations may be described as follows:

In Otoe County the poll books were forwarded to the office of the secretary of the Territory instead of being kept in the office of the county register, as the law required, there to be canvassed by the probate judge and three assistants. An abstract of this canvass should have been certified and sent by the county register to the secretary of the Territory. The majority considered these provisions merely directory, and that the failure to comply with them should not affect the Otoe return. The minority on the other hand deemed the canvass by the probate judge and the certification of the abstract of essential importance. The actual returns sent to the office of the Territorial secretary were signed by persons purporting to have acted as judges of election and clerks of election in Otoe County; but there was nothing accompanying the return to show that they had authority so to act.

[1] First session Thirty-fourth Congress, 1 Bartlett, p. 204; Rowell's Digest, p. 147; House Report No. 65.

In Washington County the abstract of the canvass was certified by the register; and the register in making out the certificate certified that no poll books were returned from two of the three precincts, the law requiring the poll book to be sent to the county clerk. The majority contended that the certified abstract was all the register was required to send, and that the certification as to the poll books, being outside of his duties, should be rejected. The probate judge might have refused to make the abstract without the poll books; but that abstract being made, it was the duty of the register to certify it. Proof of the failure to return the poll books should have been made in some other way than by the certificate of the county register. The majority did not consider this failure to send the poll books with the precinct return sufficient reason for disfranchising a whole county. The minority contended that the Washington County returns had not been duly authenticated according to law, and that they were properly rejected by the Territorial canvassers. The minority claimed that the abstract also was made out and certified by the register and not by the judge of probate, as required by law. Also it was held that the omission to return the poll books was fatal to the authenticity of the canvass.

As to Richardson County, the majority and minority of the committee do not seem to lay stress on the same facts. The minority find from the evidence that at two of the three voting places the election was conducted without legally appointed officers. The minority, referring to the precedent of Jackson *v.* Wayne, contended that the elections at those precincts were illegal and void. The majority of the committee do not meet this point in their report, but contend that the entire vote of the county should have been counted by the Territorial canvassers, instead of being rejected.

In this county, moreover, there was the further objection that about twenty illegal votes were cast by certain persons residing on an Indian reservation known as the "Half-breed tract." It was agreed that these votes were cast for the contestant. The majority considered that the testimony left it to be inferred that these votes were not counted for the contestant; but held that if they were so counted it was done properly. The governor had excluded them from the census, but this could not affect their right of suffrage, which was held by the law of the land. It was also alleged that they were trespassers on Indian lands, but this also could not interfere with their right of suffrage. Doubts as to whether they were in any election precinct and as to whether they were within the limits of Nebraska did not appeal so strongly to the majority as to the minority of the committee. The minority also laid stress on the fact that the people themselves did not claim to be within the civil jurisdiction of the Territory, and refused to pay taxes. The minority felt sure the votes were counted for contestant.

It appeared that if all the votes returned to the office of the secretary of the Territory were counted the contestant would be returned, but if from this total the votes from "Half-breed strip," about 20 in number, should be deducted the plurality would be left with the sitting Member.

The rejection of all the returns from the counties impeached also left the plurality for the sitting Member.

The majority reported resolutions declaring Mr. Chapman not entitled to the seat, and seating the contestant.

The report was considered on July 21 and 22,[1] and after debate the resolution declaring Mr. Chapman not entitled to the seat was disagreed to—yeas 63, nays 69.

On July 23 the second resolution for seating the contestant was laid on the table without division.

So the House sustained the contention of the minority of the committee.

830. The election case of Otero v. Gallegos, from the Territory of New Mexico, in the Thirty-fourth Congress.

The notice of contest need not give the names of voters objected to for qualifications.

The presence of names on a list of foreign citizens enrolled under authority of a treaty was held prima facie evidence of disqualification for voting.

The disqualification of certain voters being shown prima facie, the burden of proof was thrown on the party claiming the votes.

On May 10, 1856,[2] the Committee on Elections reported on the case of Otero *v.* Gallegos, from New Mexico. This case involved the following points: That the notice of contest was defective; that certain persons who voted for the sitting Delegate were not qualified; that certain votes should be counted in spite of the misconduct of election officers, and that certain ballots should be impeached on testimony of the voters.

As to the first point, the objection to the sufficiency of the notice, the sitting Delegate contended that notice of impeachment of votes should be accompanied by the names of the particular voters intended to be impeached. The committee overruled the objection, holding that the notice was sufficient to permit the taking of the testimony, and that the sitting Delegate should have entered his objection at the time of taking the depositions.

The objection as to the qualification of voters related to certain inhabitants of the Territory who, under the terms of the treaty with Mexico, had elected to remain citizens of Mexico, and were expressly disqualified from voting under the law of New Mexico. The number of these disqualified persons alleged to have participated in the election for the sitting Delegate was more than enough to account for the majority of 99 votes by which he was returned. The law of New Mexico, while providing for voting by ballot, also provided that each ballot should be numbered when received, the number being entered with the name of the voter on the poll book, but the identity of the vote not to be disclosed except in case of contested election. So it was practicable to decide for whom the disqualified voters cast their ballots. The evidence as to disqualification consisted in the books whereon, in obedience to the precept of the military governor, the Mexican citizens who desired to retain their Mexican citizenship had been enrolled. The comparison of this enrollment with the poll books showed the names of the Mexicans who had voted, and this was taken as prima facie evidence of the disqualification of the voters. The committee admit that, in the absence of testimony to connect the names with the persons, the evidence was not conclusive, but it was considered sufficient to throw the onus pro-

[1] Journal, pp. 1245, 1259, 1264; Globe, pp. 1688, 1711, 1729.

[2] First session Thirty-fourth Congress, House Report No. 90; 1 Bartlett, p. 177; Rowell's Digest, p. 144.

bandi on the sitting Delegate. The committee found that the sitting Delegate failed to overthrow the prima facie evidence in enough cases to result in the wiping out of his majority.

The sitting Delegate objected that the enrollment of these Mexican citizens was invalid because not made in accordance with a law of Congress. The committee held that the action of the military governor under the treaty was sufficient.

831. The case of Otero v. Gallegos, continued.

Failure of the judges of an election to take the required oath was held to vitiate the return.

Instance wherein absence of certificate that election officers were sworn was deemed conclusive in absence of testimony to the contrary.

The destruction of the secrecy of the ballots by crying out the votes as given was deemed a reason for rejection of the poll.

Testimony taken before an officer other than the one named in the notice was rejected by the committee.

After the election the testimony of the voter as to how he voted may not be received to impeach the ballot recorded as cast by him.

Another objection urged by the contestant was that the secretary of the territory had counted for the sitting Delegate certain votes of the precinct of Mecilla, which the probate judge, assuming to act under the law, had rejected in making up his return for irregularities. The committee did not inquire as to the legality of the act of the probate judge, since the House had the right to determine whether or not the election in this precinct had been conducted in accordance with the laws of New Mexico.

The committee found that the poll-book certificate, that the judges were sworn, was wanting, although required by law; and considered this evidence, given by the judge of probate, as sufficiently conclusive in the absence of testimony to the contrary, the onus probandi being thrown onto the other side in accordance with the principle established in the case of Draper *v.* Johnston. The failure of the judges to take the oath vitiated the election, in the opinion of the committee, who cited the cases of McFarland *v.* Culpepper, Draper *v.* Johnston, and Easton *v.* Scott.

It was furthermore found in regard to this precinct that the officer receiving the ballot cried it out, thus destroying its secrecy and causing the proceeding to amount practically to viva voce voting.

Then, also, a bystander, who was neither judge nor clerk, assisted in receiving the votes; the poll books furnished by law were not used, and others substituted, and 192 ballots, neither numbered nor registered as required by law, were found in the box.

For all these reasons the committee recommended the rejection of the vote of the precinct.

The sitting Delegate alleged and attempted to prove frauds in the precinct of Chamisal, the charge being that 160 legal votes for him were abstracted and an equal number for the contestant put in.

The sitting Delegate in his notice had declared that he should examine the witnesses to prove the above before the chief justice of the supreme court of the ter-

ritory, but in fact the testimony was taken before a probate judge. For this reason a majority of the committee held that this testimony should be rejected.

The sitting Delegate had taken the testimony of the voters to prove that the ballots counted were not the ballots cast. The committee say:

> It would be productive of unending frauds and perjuries to permit parties to come forward, after an election by ballot, and swear that they voted differently from what the ballots themselves exhibit. Especially must this principle apply under the system adopted in New Mexico, where every ticket is numbered, and the number also recorded in the poll books opposite to the name of the voter. The only proof which ought to be admitted to establish a fraud such as that charged in this case would be to show, by affirmative testimony, that the judges, clerks, or some other persons actually withdrew the tickets given by the voters and substituted others for them. Until this shall be shown, the oath of the voters should not be received to contradict the record and the ballots themselves. The very nature of the ballot renders this principle a necessity; otherwise, every election might be tried over a second time by the oath of the voters instead of the ballots deposited in the boxes in the presence of the officers and of the public.

In support of this doctrine the committee cite the case of Van Rensselaer *v.* Van Allen.

The conclusions of the committee showed a majority for the contestant, and resolutions declaring Mr. Gallegos not elected, and that Mr. Otero was entitled to the seat were reported.

On July 23,[1] the two resolutions were agreed to after debate without roll call; but on the motion to lay on the table the motion to reconsider the yeas, and nays were ordered, and the motion was agreed to, yeas 128, nays 22. This vote seems to have been on the merits of the case, the Member demanding the yeas and nays saying that he did so because he believed the sitting Member entitled to the seat.

832. The Iowa election case of Clark *v.* Hall in the Thirty-fourth Congress.

The House declined to reject for mere informality a return which truly represented the aggregate vote cast.

The House declined to reject returns, although it was shown that some votes (not enough to change the result) actually cast were not included.

On February 4, 1857,[2] the Committee on Elections reported in the case of Clark *v.* Hall, of Iowa. They came to the conclusion that the sitting Member was duly elected, and entitled to the seat. This conclusion was concurred in by the House without division.

The grounds of the contest and conclusions of the committee are set forth in the following extract from the report:

> It appears from the canvass of the State canvassers of Iowa that the sitting Member received one hundred and seventy-seven more votes than the contestant, of the votes which they received and allowed.
>
> The State canvassers, by the laws of Iowa, canvass abstracts furnished by certain county officers of the votes thrown in the several counties.
>
> Objections are made in this case, both to alleged informalities in these county abstracts and to their alleged want of correspondence with the state of the votes as actually cast in the voting precincts.

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[1] Journal, pp. 1265, 1266; Globe, p. 1736.

[2] Third session Thirty-fourth Congress, Journal, p. 356; Globe, p. 569; 1 Bartlett, p. 215; Rowell's Digest, p. 148; House Report No. 178.

In conformity with the principles acted upon by your committee in the case of the contested seat of the Delegate from the Territory of Nebraska, your committee would not reject for mere informality a county abstract which truly presents the aggregates of the votes actually cast in the voting precincts.

In this case there is evidence that legal votes actually cast both for the contestant and the sitting Member are not embraced in the county abstracts. It does not, however, sufficiently appear that the corrections authorized by the evidence would so far change the result as to give the contestant as many votes as the sitting Member received.

833. The Maryland election case of Brooks v. Davis in the Thirty-fifth Congress.

It was conceded in 1858 that the House was not necessarily bound by the law of 1851 in judging of the elections, returns, and qualifications, of its Members.

In 1858 the House deemed insufficient reasons urged by a contestant for proceeding in a manner different from that prescribed by the law of 1851.

In 1858 a proposition that witnesses in an election case be examined at the bar of the house found no favor.

On February 12, 1858,[1] the Committee on Elections reported in the case of *Brooks* v. *Davis,* of Maryland, on the petition of contestant that he be not required to continue to proceed under the law of 1851, but that a committee with adequate powers be appointed to investigate the election. The contestant assigned the following reasons for granting the request: (1) That the authorities of Baltimore were unwilling or unable to so preserve the public peace as to prevent the intimidation of witnesses; (2) that the extensive nature of the conspiracy charged necessitated a longer time than the sixty days allowed by law for taking testimony; (3) that the required ten days' notice to sitting Member of names and residence of witnesses would enable the intimidation of those witnesses; and (4) that the bearing and evident disposition disclosed by witnesses would be lost in its effect if the evidence should be in the nature of depositions.

This memorial was accompanied by the indorsement of reputable citizens of Baltimore.

The majority of the committee found no reason for extraordinary action by the House. It was not established that evidence could not be safely taken in Baltimore under the act of 1851. Another contestant in another case was actually taking such testimony at this time. As to the argument that sixty days was too short a time the majority considered that the contestant should have gone on taking testimony, and asked for an extension if the time should be found too short. The third reason was subject to the same answer as the fourth. As to the fourth reason, the committee considered that under no circumstances could the House examine the witnesses at the bar.

The minority of the committee[2] considered that the act of 1851 was intended to apply to such cases as involved personal contests of election, while the pending

[1] First session Thirty-fifth Congress, House Report No. 105; 1 Bartlett, p. 245; Rowell's Digest, p. 154.

[2] Messrs. Henry M. Phillips, of Pennsylvania; Thomas L. Harris, of Illinois; John W. Stevenson, of Kentucky, and Lucius Q. C. Lamar, of Mississippi.

case was rather one of popular remonstrance against the validity of an election. There seemed to be reason for such an investigation as was asked. The governor of Maryland, in his message to the legislature, had recorded his opinion that the election was fraudulently conducted; that thousands of people had been excluded from the polls, and that there was no expression of the popular will. Here was a case where there was justifiable ground for not complying strictly with the terms of that law. "If it is claimed," say the minority, "that the act of 1851 prevents the House of Representatives from pursuing an investigation in any other manner than prescribed by that act, it would then be wholly inoperative, coming into conflict with the fifth section of the first article of the Constitution of the United States, which provides 'each House shall be the judge of the elections, returns, and qualifications of its own Members.' No prior House of Representatives can prescribe rules on this subject of binding force upon its successor, nor can the Senate interfere to direct the mode of proceeding. The House of Representatives is not a continuing body, each body of Representatives having an independent and limited existence, and having the clear right to determine, in its own way, upon 'the elections, returns, and qualifications of its own Members.' A like authority is given, and in similar terms, to each House to 'determine the rules of its proceedings, punish its Members for disorderly behavior,' etc.; and no Member will pretend that a general law, passed in such terms as the act of 1851, would restrain any House from acting on these subjects independently of the law."

On February 16 and 17 [1] the report of the committee was considered and acted on. In this debate Mr. W. W. Boyce, of South Carolina, who submitted the report of the majority of the committee, did not deny the power of the House to proceed independently of the act of 1851. The power of the House to "judge of the elections, returns, and qualifications of its own Members," being granted by the Constitution, could not be taken away by law.

But Mr. Boyce argued very strongly that it was not expedient in this case to go outside the law. The fact that Mr. Brooks was not himself contesting the seat did not the less make the law applicable.

Mr. Horace Maynard, of Tennessee, argued [2] that the law of 1851 did not trench on the constitutional prerogative of the House, simply determined the mode by which the question should be presented to the House, and said that under his interpretation of the law and Constitution he could not conceive of any other mode than the act of 1851 by which a seat could legally be contested.

The proposition of the minority that the Committee of Elections have power to send for persons and papers, etc., in order to investigate the election, was disagreed to, yeas 86, nays 110.

Then the resolution of the majority, "that it is inexpedient to grant the prayer of the memorialist for the appointment of a committee to take testimony," was agreed to, yeas 115, nays 89.

On May 19, 1858,[3] the committee was discharged from the further consideration of the case, and it was laid on the table.

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[1] Journal, pp. 394, 397–400; Globe, pp. 725, 745.

[2] Globe, p. 727.

[3] Journal, p. 848.

834. The election case of Chapman v. Ferguson, from the Territory of Nebraska, in the Thirty-fifth Congress.

Instance wherein the House permitted the time for taking testimony in an election case to be lengthened, although one or both parties had been negligent.

The House decided to count as cast for "Fenner Ferguson" certain ballots cast for "Judge Ferguson."

The House decided to count certain returns rejected by local canvassers because not transmitted within the time required by law.

The House, by reason of the ex parte nature of the evidence, declined to follow its committee in rejecting the poll where the conduct of election officers was irregular and apparently fraudulent.

On April 21, 1858,[1] the Committee on Elections reported a resolution allowing a further time of sixty days for the taking of testimony by the parties in the contested election case of *Chapman* v. *Ferguson,* of Nebraska Territory.

The committee reported that the election had been held in the preceding August; that the result was not announced officially until the 3d of the following September; that the contestant gave notice to the sitting Member on September 16 of his intention to contest, and the response of the sitting Member, dated October 2, 1857, was served on contestant on the 10th day of that month. The committee further say:

> No notice of intention to take testimony was given by the contestant until the 13th and 14th days of November, when more than one-half of the time allowed by law to take the same had expired, nor until after the sitting Member had left the Territory for this city to enter upon the discharge of his duties. The sitting Member has made oath that he knew nothing of the testimony taken in this case until he saw it printed in Miscellaneous Document No. 5, of this House, and that he has had no opportunity to rebut and disprove the same.
>
> Your committee are of opinion that the sitting Member erred in not leaving an acknowledged attorney in the Territory to look after the contest, of which he had been notified; and were the contestant and the sitting Member alone those who have an interest in its decision, your committee might hesitate before coming to the conclusion to which they have arrived. The question to solve is, not simply what these parties have done or omitted to do, but what was the expressed wish of the people of Nebraska, as between these candidates, at their late election? And what is a reasonable time and indulgence, under the circumstances, to obtain proof of that wish?
>
> As the contestant permitted more than one-half of the time allowed by law to elapse before commencing his proof, he can have but little cause for complaint should the period for taking proofs be extended. And as the election has been so recently held, and the contestee averring that he never had any notice of taking testimony, your committee are of opinion that justice to the contestee, as well as to the people of Nebraska, requires that time be given to take further evidence.

Considerable doubt arose as to this proposition, it being objected that the extension of sixty days would deprive the Territory of its Delegate's services during the greater part of the session. So an amendment was agreed to extending the time to the first of October next. As amended the resolution was agreed to, yeas 98, nays 86.[2] The opposition based their course on the fact that the notice had been left at the sitting Member's house, occupied by a man alleged, but not admitted, to be the agent of the sitting Member.

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[1] First session Thirty-fifth Congress, House Report No. 51; Globe, pp. 1717–1720; 1 Bartlett, p. 267; Rowell's Digest, p. 159.

[2] Journal, p. 662.

On February 4, 1859, the majority and minority reports were submitted. Both majority and minority agreed on the following conclusions:

That certain votes cast for "Judge Ferguson" instead of "Fenner Ferguson" and rejected by the board of canvassers should be counted for the sitting Delegate.

That contestant was entitled to certain votes cast at the precinct of Cuming City and not counted by the Territorial canvassers because the judges of election did not return the poll books to the county clerk within the time required by law, by reason of which the county clerk failed to certify an abstract to the governor. The cases of Richards, Bard, Spaulding *v.* Mead, and Mallary *v.* Merrill were cited in support of the doctrine that these votes should be counted for the contestant.

The corrections of the vote in accordance with the above principles did not fatally affect the title of the sitting Member to the seat.

But the contestant charged extensive frauds in three precincts, which would, if proven, be sufficient to take away the majority of the sitting Delegate and show the election of the contestant.

The evidence in relation to these precincts was conflicting. In general, residents of the precincts in question testified or made affidavit that the election was pure. The testimony that there was fraud was quite largely from persons who had gone to the precincts and testified as to what had been told them. This evidence was attacked as hearsay. There were suspicious circumstances admitted, such as the names of "Samuel Weller" and "Oliver Twist" among the voters, the keeping of the polls open in one precinct after the legal time of closing. While admitting that votes received after the hour for closing the polls should be deducted, the minority did not consider the testimony sufficient to justify further deductions, and therefore found that the sitting Delegate was entitled to the seat.

The majority of the committee, on the other hand, recommended the deduction of votes which they considered proven to be fraudulent in two of the precincts. In the third precinct where the polls were kept open after the legal hour, where 401 votes were returned for the sitting Member and 4 for the contestant, where it was alleged that the election officers were not properly sworn, and in relation to which the county canvassers had unanimously recommended the rejection of the entire precinct vote, the majority recommended that the entire vote be thrown out. This recommendation, if carried out, would entitle the contestant to the seat.

The report was debated at length on February 9 and 10, 1859.[1] The discussion was on the weight of the evidence (much of which was taken ex parte by contestant) in regard to the frauds alleged in the three precincts; and there appeared a diversity of opinion, which was finally settled by laying the whole subject on the table, by a vote of yeas 99, nays 93.

So the sitting Delegate retained his seat.

835. The Ohio election case of Vallandigham v. Campbell in the Thirty-fifth Congress.

It is not necessary that the notice of contest specify the names of individual voters whose qualifications are challenged.

A certificate of the returns, under seal of the State, was admitted as

[1] Second session Thirty-fifth Congress, Journal, pp. 375, 377; Globe, pp. 914, 941.

evidence in an election case without regard to the requirements of the law of 1851 as to testimony.

On May 13, 1858,[1] the Committee on Elections reported its inability to agree upon a recommendation in the contested election case of Vallandigham *v.* Campbell, of Ohio. Four of the committee found the contestant entitled to the seat; four found the sitting Member entitled to it; and the remaining Member reached the conclusion that the seat should be declared vacant on account of the difficulty of ascertaining who was elected.

The following were the principal questions involved in the examination: The sufficiency of the contestant's notice of contest; the admissibility of a certificate of the secretary of state as to the votes cast, and the nature of this and the poll books as evidence; the admissibility and sufficiency of evidence as to how certain voters cast their ballots; the qualifications of certain voters' especially some mulattoes.

The minority favoring the sitting Member, whose views were submitted by Mr. John A. Gilmer, of North Carolina, contended that contestant's notice had not been sufficient, for the reason that it did not specify "particularly" the grounds of contest by naming the voters whose qualifications were questioned and the legal objections to the admission or exclusion of each. Mr. Gilmer cited the cases of Varnum. and Easton and Scott in support of this contention. The further objection was made that the contestant had made no particular specification as to the number of votes questioned and their relation to the votes cast and the result. The specifications as to "sundry ballots," "sundry persons," etc., were not specifications at all.

In opposition to these objections, it was argued by Mr. Lucius Q. C. Lamar, of Mississippi, who presented the views of another portion of the committee, that the law did not require any more to be set forth than the class to which the voters belonged, especially as by express provision it required each party to furnish ten days in advance the names of the witnesses proposed for examination. This view had been taken in 1852 in the case of Wright *v.* Fuller, and in the more recent case of Otero *v.* Gallegos.

Mr. Gilmer's minority objected that there was no proof whatever which professed to give either the aggregate vote for each party or the majority for the sitting Member. After the time allowed by law for taking testimony had expired, a paper had been presented under the seal of Ohio and the official certification of the secretary of state, giving an abstract of the votes given at the election in question. This paper was not admissiable as testimony, for the time for taking testimony had expired when it was presented. Furthermore it was only a mere copy of a certificate which itself was merely a result ascertained by calculation from the original and only source of information, the poll books. The law of Ohio required each voter to be registered in the poll book at the time of voting, and this book to be returned to the clerk of the county. From it the county clerk certified to the governor the summary of votes. Thus the original record was not the clerk's certificate to the governor, but the poll books. The certificate might be adequate foundation for the mere ministerial acts of the governor in giving the certificate of election—but it was not

[1] First session Thirty-fifth Congress, House Report No. 380; 1 Bartlett, p. 228; Rowell's Digest, p. 151.

evidence in a legal contest when the question was not how many votes were certified to the governor, but how many were actually cast at the polls. If the certificate were to be admitted as evidence that the voters actually cast the votes as enumerated in the certificate, it would be on the supposition that the certificate in the secretary's office was written official evidence of the votes cast. If so this would exclude all parol evidence of the contestant to show how particular persons voted. For it would follow that the poll books were the original records of those who voted at the election; and being the written legal evidence preserved by law, all secondary evidence, even of the voter himself that he voted for either party, would be excluded.

Mr. Lamar argued against the above contentions. He held that the testimony required by the act of 1851 was the testimony of "witnesses," or at most such writing as could be proved only by the examination of witnesses. But documentary evidence, at least such as proved itself, might be obtained at any time after sixty days, and be produced before the committee. The document in question, bearing the great seal of the State, was of the highest authenticity. It was further urged that in most of the cases since 1851 the abstract of the returns had been obtained subsequent to the sixty clays limited in the act. As to the poll books, no provision was made anywhere for furnishing copies for any person, and that they were not within the acts of Congress touching the authentication of records, and were not anywhere declared to be records. Not only were they not the sole and best evidence to prove that a particular person voted, but they were not themselves sufficient. Parol evidence of identity was always necessary; and the name on the list was only corroborative evidence. In Newland *v.* Graham the committee had received evidence that persons voted whose names were not on the poll books at all. In the New Jersey case of 1840 the committee "resorted to parol proof as the best evidence the case would admit, the laws of New Jersey not requiring the poll lists to be preserved as a record of die actual voters." A comparison of those laws with the laws of Ohio on the subject of poll books would show that this precedent was precisely in point.

836. The case of Vallandigham v. Campbell, continued.

The vote thrown by an alleged disqualified voter may be proven by his own testimony or that of friends who heard his declarations.

A theory that a voter, whose qualifications are challenged, is a party whose confession is proper evidence.

Argument that an election case is a public inquiry which should proceed on more liberal principles than a private litigation.

As to the qualifications of voters, there were charges that disqualified persons voted at various places. The minority, led by Mr. Lamar, held that enough was proved as to these alleged disqualified voters to show the election of the contestant. Mr. Thomas L. Harris, of Illinois, who signed the third minority views, considered the evidence sufficient to destroy confidence in the election, but thought the difficulty of determining how people voted by secret ballot too great to enable a satisfactory decision as to who was elected. After a vote was proved to be illegal, the great difficulty was to show for whom it was cast. Hearsay evidence must be resorted to, and that was always dangerous, and should be received with the greatest caution.

Mr. Lamar, on the other hand, argued that the committee and the House should proceed upon liberal principles in a contested election, which was not a mere private litigation, but a great public inquiry. The distinction between the House and the ordinary forensic court was recognized both by Congress and the usages of Parliament. The admissibility of evidence consisting of the declarations of voters as to any matter concerning their own voting has been settled in the British Parliament repeatedly and uniformly for one hundred and fifty years, and was no longer to be questioned. As to the hearsay declarations of third powers, the reception of such was put upon the ground that each voter challenged was a party to the proceeding, and therefore what he said about his own voting was an admission or confession. Mr. Lamar illustrates the kind of evidence accepted by his portion of the committee by the following description:

> Anderson testifies to his own vote and as to the declaration of two others, his friends, one of whom worked with him; that there was an understanding between him and them that they were to vote, and they did vote, for the sitting Member. As to those who voted in Oxford, Lawrence, one of the twelve, declared to the witness that he voted for the returned Member and advocated his election; and the proof as to the others, including Lawrence, though circumstantial, is just such as has been repeatedly received and acted upon by committees and the House. That it is not positive and direct is because the nature of the case, the vote being by secret ballot, does not usually admit of such proof.

By the admission of such testimony as to voters, Mr. Lamar's minority found a majority of 23 votes for the contestant. A portion of the challenged voters were persons of color—mulattoes—and there was a legal question as to whether under the constitution of Ohio and the judicial decisions some of these should be considered white or black. Mr. Lamar's minority arrived at the conclusion that they were black and were not qualified. The point was not dwelt upon in Mr. Gilmer's report, which based its defense of the sitting Member on the other questions in the case.

The report was debated May 22,[1] especial attention being given to the nature of the evidence by which it was attempted to show that the mulatto voters supported the sitting Member.

Mr. Lamar, in the debate,[2] also dwelt upon the allegation of the contestant which had not been noticed in the reports—that the election in the second ward of Dayton was void because the person who presided as judge was elected in violation of law. The House had waived informalities in the returns frequently, provided the election itself was fairly and legally conducted. The case of Jackson *v.* Wayne was quoted in support of this view.

On May 25[3] the House began voting on the case, a motion to recommit for the purpose of allowing further testimony to be taken being decided in the negative, yeas 92, nays 116.

The question being next put on a proposition declaring the sitting Member entitled to the seat, it was decided in the negative, yeas 92, nays 116.

The question was next taken on two resolutions: First, that the sitting Member was not entitled to the seat; second, that the contestant was entitled to it.

On the two resolutions the question was decided in the affirmative, yeas 107, nays 100.

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[1] Globe, p. 2316.

[2] Globe, p. 2331.

[3] Journal, pp. 902–910.

837. The Michigan election case of Howard v. Cooper in the Thirty-sixth Congress.

The sitting Member having clearly neglected his opportunities, the Elections Committee decided against his request for additional time to take evidence.

A State law requiring a residence of ten days in a ward as qualification of a voter, yet it was held that he must be there with the intention of remaining.

On March 15, 1860,[1] the Committee on Elections reported a resolution declaring it inexpedient to grant the application of the sitting Member for additional time to take testimony in the contested election case of Howard *v.* Cooper, of Michigan. The sitting Member accompanied his memorial by 29 ex parte affidavits, which he asked to have made a part of the case. If this request should be refused he asked for the extension of time. The majority of the committee did not favor either request, but concluded that the sitting Member, by delaying more than eleven months after the legal limit for taking testimony, and until one-half of the time of service of the Congress had expired, had presented a clear case of laches. In the case of Vallandigham *v.* Campbell it had been determined that the two parties might proceed to take testimony simultaneously during the sixty days allowed by law; and further, that if either should wish more time he should proceed (Congress not being in session) to give notice to the other party and take it after the expiration of the sixty-days' limit, relying on its being accepted by the House.

The minority of the committee favored granting the request, finding a distinction between this case and others in that the sitting Member desired to impeach the veracity of witnesses examined at the last moment allowed for taking testimony under the act of 1851, and which might not be impeached if the permission was not granted.

The question was debated at length on March 22,[2] when the resolution proposed by the majority of the committee, denying the request, was agreed to, yeas 89, nays 79.

On April 19,[3] the majority of the committee reported that the sitting Member, Mr. Cooper, was not entitled to the seat, and that Mr. Howard, the contestant, was entitled to it.

The contestant sought to overcome sitting Member's plurality of 75 votes by alleging several instances of fraud and irregularity, either of which, if substantiated, would be sufficient to overcome the plurality. The points were four:

(1) Illegal votes: The committee found over 100 illegal votes cast for sitting Member. In certain wards of the city of Detroit men were brought in from other wards of the city, from other States, and even from Canada, the legal limit of ten days before election, and were allowed to vote, the testimony indicating that they voted for sitting Member. The committee came to the conclusion that under the law of the State of Michigan a man must have gone to the ward where he voted with the

[1] First session Thirty-sixth Congress, House Report No. 87; 1 Bartlett, p. 276; Rowell's Digest, p. 161.

[2] Journal, p. 568; Globe, pp. 1307–1318.

[3] House Report No. 445.

intention of making it his permanent residence, as the law of Michigan required a residence of three months within the State and of ten days before election within the township or ward where the vote is cast. Therefore the majority concluded that the votes brought in within the ten days' limit were illegally cast. The minority of the committee contended that there was no evidence to show that the men whose votes were impeached resided out of the State of Michigan, and that as they had resided in the ward ten days before election, and as their votes had been challenged on election day and admitted, the votes should generally be counted. Such votes as the minority admitted to be impeached were not sufficient to affect the plurality of the sitting Member.

838. The case of Howard v. Cooper, continued.

A voting place fixed by competent authority being changed without competent authority, the votes cast there were rejected.

There being only two inspectors of election where the law required three, the returns were rejected.

Irregularities being so great as to prevent a determination of how many bona fide votes were cast, the poll was rejected.

Charges of riot and intimidation being to some extent substantiated, yet the committee believed that in case of doubt the returns should stand.

(2) At Grosse Pointe parish the place of voting was changed from the accustomed place, in disregard of the law of Michigan, which provided that the "annual and special township meetings" should be held at the last place of meeting or such other place as the previous meeting had directed. The committee considered that the voting place had been fixed by competent authority and changed without competent authority, and therefore that the vote could not be counted. The minority contended that the law quoted by the committee applied only to the township meetings and not to general elections, and claimed that the place of meeting had been properly changed under provisions of another law which required the town clerk as inspector of election to give due notice of the time and place of election. The majority denied, however, that this function of giving notice involved the other function of "fixing" the place. The minority further contended that no evidence was given to show that any persons were prevented from voting by the change of place of the meeting. The rejection of the poll at this voting place would be sufficient of itself to determine the contest in favor of the contestant.

(3) The majority of the committee decided in favor of rejecting the vote of the township of Van Buren because the proof was clear that there were but two inspectors present at the polls, while the law required that the board of inspectors should be composed of three persons.

(4) The majority of the committee decided in favor of throwing out the entire vote of the Fourth Ward of Detroit because of "irregularities and informalities, such clear violations of the statutes of Michigan, and such errors of substance as to destroy all certainty as to the accuracy of the result." Two tickets, one for State officers and one for Member of Congress, were cast in one box. No poll lists were kept so as to show whether of the two tickets cast by a voter one was for State officers and the other for Congressman, or both were for Congressman or both for

State officers. The committee considered that this was sufficient to prevent determining how many bona fide votes were cast for Congressman.

It was also found in this ward that one of the ex officio inspectors of election, who was, as appears from the debate, a candidate voted for at the election, declined to serve when the polls were opened, and another was chosen, conformably to law, to fill his place. But when the polls closed the elected substitute retired and the ex officio inspector, who had declined in the morning, came forward and assisted at the count. The majority alleged that the evidence showed that he was not sworn, but the minority did not admit this.

The charge was made that the polls in the Second Ward of Detroit were in the possession of rioters and prize fighters during the day and that the entire vote should be thrown out. There was testimony tending to substantiate this charge, but the committee recommended that the poll stand, saying:

> If the state of facts proved leave it doubtful whether, on the whole, the poll should be retained or rejected, your committee are of opinion that they will best avoid the establishment of bad precedents by giving effect to the returns in all cases of doubt.

On May 14 and 15[1] the report was debated in the House at length, and on the latter day the House, by a vote of yeas 97, nays 77, agreed to a resolution declaring the sitting Member not entitled to the seat. Then, by a vote of yeas 92, nays 71, the resolution seating the contestant was agreed to.

839. The election case of Daily v. Estabrook, from the Territory of Nebraska, in the Thirty-sixth Congress.

A contestant may serve more than one notice of contest, provided that each notice be served within the required time.

A certified copy of the official abstract of the vote is competent proof in an election case.

The limit on the time of taking testimony in an election case applies to witnesses and not to a certified copy of the returns.

On April 20, 1860,[2] the Committee on Elections reported in the case of Daily *v.* Estabrook, of Nebraska Territory. Besides the merits of the case there were raised also certain preliminary questions of importance:

(*a*) Sitting Delegate asserted that under the act of 1851 but one notice of contest could be served by contestant on contestee and that the contestant must abide by this notice, whether sufficient or not. The committee did not sustain this view, but concluded that more than one notice might be served, provided they be served within the time required by the act.

(*b*) Sitting Delegate also challenged the competency as proof of the certified copy of the official abstract showing the result of the vote in the Territory. The committee overruled this objection, saying:

> The act of organization of Nebraska provides that the secretary of the Territory shall preserve all the acts and proceedings of the governor which pertain to his executive duties. He is, therefore, made the custodian of this abstract, and, as the original must remain where it is, it is competent to prove its contents by a certified copy. That is done in this case, and the committee think it is the best evidence that could be offered.

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[1] Globe, pp. 2092, 2101, 2110; Journal, pp. 841, 843.

[2] First session Thirty-sixth Congress, House Report No. 446; 1 Bartlett, p. 299; Rowell's Digest, p. 163.

(*c*) Sitting Delegate further objected that the above abstract could not properly be received as evidence, because procured after the contestant had given notice that he would procure no further testimony and would give notice in case of a change in this determination. The committee construe this as referring only to the "examination of witnesses," and consider the certificate from the secretary of the Territory proper evidence, properly obtained, especially as sitting Delegate did not allege it to be false.

(*d*) Sitting Delegate alleged that the evidence was not taken before a proper officer, claiming that a judge of probate in Nebraska was not a judge, of a court of record, as required by the act of 1851. The committee considered such a court a court of record from the nature of the case, and furthermore showed it to be such by express provision of Nebraska law.

On the merits of the case the committee found sufficient irregularities and frauds to overcome the majority of 300 returned for the sitting Delegate and show a majority of 119 votes for the sitting Delegate.

840. The case of Daily v. Estabrook, continued.

Votes from a county illegally organized, whose election officers were improperly commissioned and where there was some fraud, were rejected.

Returns in themselves suspicious, transmitted irregularly and opened by an unauthorized person, were rejected.

A tainted vote from an illegally organized county was rejected.

Returns from a precinct not by a law a part of the district were rejected.

Fraud, shown by oral testimony as to a stolen poll book and inferred from acts of violence, was held to justify the rejection of a greater part of the returned votes.

The irregularities and frauds occurred under the following conditions:

(1) The county of Buffalo returned 292 votes for the sitting Member. The committee found that this county was not legally organized, that the officers who must have conducted the election were improperly commissioned by the governor of the Territory, and that the votes returned from the county had been therefore illegally counted by the canvassers and should be deducted from the poll. The committee also were convinced from the evidence that there was fraud, the votes of one place not within the county being included in the vote of the county.

(2) The county of Calhoun, not being organized, should under the law have returned its poll books to the clerk of the next adjoining county, Platte County, whose duty it was under the law to send an abstract of them to the governor. But the Calhoun County returns were sent directly to the governor, whose private secretary took them from the post-office, opened them, examined them, and then sent them to the clerk of Platte County, with direction to return them with the Platte County returns. The committee say:

> This was manifestly a violation of law. The law of the Territory, as also of all the States, has pointed out a particular mode of making election returns and has designated particular officers who shall open and inspect them. If they are opened and inspected by any others, they are thereby vitiated, for if such a practice were tolerated innumerable frauds might be perpetrated and the popular will defeated. By the law of Nebraska Territory the votes polled in Calhoun County could not be properly opened by

any other persons than the probate judge and three disinterested householders of Platte County. Yet it is in proof that they were opened by the private secretary of the governor, and it is not proven or pretended that the probate judge or any three householders of Platte County ever saw them. On the contrary, it is proven that they were sent by the private secretary of the governor to the clerk of Platte County and by him sent back to the governor. The clerk must have opened them himself; this is the necessary inference.

In the opinion of the committee, therefore, this violation of law vitiates the whole of the returns from Calhoun County.

The committee further found evidence to justify the belief that the returns from this county were originally fraudulent, being evidently forged by some one.

(3) The committee found that the vote of Izard County was fraudulent, there being no population sufficient to account for the vote returned, and not being an organized county where an election could be legally held.

(4) The precinct of Genoa, in Monroe County, was within an Indian reservation, which could not, under the organic law of the Territory, be considered a part of Nebraska Territory until the Indian titles should be extinguished—a condition which had not been complied with. Therefore the returns from the precinct were illegal and fraudulent and should be rejected.

(5) The committee were entirely satisfied that all but 60 of the 128 votes counted for sitting Delegate in L'Eau Qui Court County were fraudulent. Not only did the testimony show that there could not be more than that number of votes in the county, but two witnesses who attempted to bring away a copy of the poll book were prevented by a mob, who declared they were parties to the fraud, and were resolved not to be exposed. The committee furthermore say:

The original poll books were afterwards stolen from the clerk's office, and doubtless were also detroyed by the same men; but the witnesses saw enough of them to swear that they contained the names of Howell Cobb, Aaron V. Brown, "ten names of McRea in consecutive order," and several others whom they knew to be nonresidents of the county.

This proof of the contents of this poll book is entirely competent, since the loss of the original is shown, and shows such fraud as ought not to go unpunished by the proper Territorial authorities. The committee, in view of them, are satisfied that they have made a liberal allowance for the vote of the county

On May 18,[1] after debate, but without division, the House concurred in the report unseating the sitting Delegate and seating the contestant.

841. The Missouri election case of Blair v. Barrett in the Thirty-sixth Congress.

A suspicious increase of votes as compared with the previous election was considered in an election case where fraud was alleged.

It not being shown that election officers were sworn and fraud appearing, the House declined to admit the usual presumption in favor of de facto officers.

The required return of the oaths of election officers not being made, the burden of proving the oath is thrown on the party claiming benefit from the votes.

On May 22, 1860,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted the report in the case of Blair *v.* Barrett, of Missouri. In

[1] Journal, p. 861; Globe, pp. 2180–2185.

[2] First session Thirty-sixth Congress, House Report No. 563; 1 Bartlett, p. 308; 1 Rowell, p. 165.

this case the corrected returns showed for sitting Member a plurality of 607 votes. The majority of the committee found irregularities, frauds, and violence, and after purging the poll there resulted a plurality of 168 votes for the contestant. The minority admitted some fraud and irregulaxities, but not enough to overcome sitting Member's plurality.

At the outset the majority laid stress upon a suspicious increase of the vote as compared with the vote at the Congressional election two years before. In the two years the total vote of the district showed an increase of 5,491 votes. Nearly the whole of this increase went to the sitting Member if the comparison with the vote of his party two years ago was to be taken as an indication. Furthermore, practically all of this increase was in 7 or 8 out of the 35 precincts of the district. And these precincts were those where irregularities and frauds were shown.—The minority of the committee did not admit that the increase of votes was unnatural.

Various questions were involved in the investigation of this case.

(*a*) The law of Missouri required that the judges of elections should take an oath, and that their qualifications should be returned with the return of the votes. It was alleged as a ground of contest that the judges in certain precincts had not taken the oath. The committee came to the conclusion that the burden was on the sitting Member, who claimed the advantage of the votes returned from these precincts, to show that the officers had actually taken the required oath. The committee say:

> The precedents of Congress justify the rejection of polls where the judges of election or clerks neglect or refuse to take the prescribed oath of office. (See McFarland *v.* Purviance, contested-election cases, p. 131; Same *v.* Culpepper, ibid., 221; Easton *v.* Scott, ibid., 281.) Of the precincts above named there was no evidence returned with the return of votes nor before the committee in any shape at the hearing that the judges of election were sworn in either the Harlem House precinct or the Gravois coal mine precinct, nor was there any in respect to the G. Sappington precinct. Had it appeared from the evidence that the election had been fairly conducted at these precincts and there were no traces of fraud, no taint of the ballot box, the committee would not have been willing to have recommended a rejection of these polls. The honest electors should not be disfranchised and their voice stifled from a mere omission of the officers of election to take the oath of office; but where, as in the case of the election districts now under consideration, gross frauds are made to appear, some of them of such a character as necessarily to complicate the officers of the election themselves; where the whole ballot box becomes so tainted as to be wholly unreliable, and it is next to impossible to ascertain what portion of the poll returned is an honest vote; when one judge has been convicted by a jury of a conspiracy to cheat, another can neither read nor write, a third is so deaf as to be incompetent from physical infirmatory to act; where one mingles in the fights of the crowd, encourages illegal voting, forgets the obligations of his position in the zeal and passion of the partisan, it is believed by the committee that they could not do less than require of the sitting Member to prove that these officers had conformed to the law before the votes they had (under these circumstances) returned should be counted. In this connection they cite a late cue of contested election in a court of law, the case of Mann *v.* Cassidy, for the office of district attorney in the city of Philadelphia at an election held October 14, 1856, contested in the court of quarter sessions in that city.

The committee further say that had the election appeared in other respects regular they would have been constrained to give the sitting Member the benefit of the principle that the acts of officers de facto are valid as regards the public and third persons who have an interest in their acts' as applied in the recent New York case of The People *v.* Cook (14 Barb. Reports, 245). The case of Draper *v.* Johnston (Twenty-second Congress) was also cited.

The minority of the committee did not admit that these election officers were not sworn, and contended that even if they were not, the principle as to the validity of acts of such de facto officers was well established. "To disfranchise and defeat the declared will of a whole community," say the minority, "for no fault of their own, or of the candidate on whom their suffrages were bestowed, through the mere omission of a judge or clerk to subscribe his name to the oath, would be an intolerable hardship and wrong."

842. The case of Blair v. Barrett, continued.

Discussion of the nature of evidence required to prove the qualifications of voters.

As to the admission of the declaration of voters challenged as to their qualifications.

As to the testimony of third persons, objected to as hearsay, in cases of voters challenged for disqualifications.

(*b*) The law of Missouri provided for a ballot which should be numbered opposite the name of the voter casting it. So, in questions as to the qualifications of voters, it was not a matter of difficulty to ascertain for whom the disqualified voter cast his ballot. As to the nature of evidence admitted by the majority to prove the disqualification of voters, the committee generally admitted evidence of the following description:

> Of the voters whose qualifications have been challenged on both sides, and which the committee decided to reject as disqualified, the evidence touching some of them was from their own lips directly, either testified by themselves or by others as their admissions. This latter testimony was admitted in the case of Vallandigham *v.* Campbell in the last Congress, and has been admitted in many other cases in this country and in England, and was not strenuously opposed in this case. Many voters were charged to be nonresidents-some of the State, and more of the particular precinct in which they voted. The very nature of the charge shows the difficulty of the proof. It involves to a great extent proof of a negative respecting persons whose names are not even known; and, except in the few instances where there may be a personal acquaintance with the man in another State or in a distant part of the same State, the proof can hardly be, from the nature of the case, of a positive and direct character. In these cases the committee based their conclusion upon evidence that these men had never voted in that precinct before; were strangers to the old residents of the precinct, to individuals who had acted as judges and clerks of election for a great number of years; had no home or business in the precinct known to those best acquainted with its homes and business, and that they had disappeared from the day of election, their whereabouts not having been discovered since even by census takers. Some of these precincts are small, casting ordinarily but two or three hundred votes; and men living within their limits for ten, fifteen, and twenty years see the vote doubled and sometimes tripled by the presence of men seen for the first and last time on the day of election. With this evidence on the one side, so easy of rebuttal by the production of the voter, if a resident, or of some one who knew him to be a resident, yet left uncontradicted, the committee could come to no other conclusion than to reject all such votes as illegal.
>
> Another class of voters challenged was unnaturalized persons, those of not sufficient residence in the State or precinct, or minors, or having some other disqualification, though not unknown to the witnesses, as in the case of nonresidents. As to the qualification of this class of voters, the admission of the voter, the testimony of his acquaintances and family, of those who had heretofore acted as officers of election, and circumstantial testimony of various kinds, was admitted for what it was worth.

The minority of the committee criticised this testimony as hearsay, indefinite, and inadmissible. The contestant had not been at pains to produce the best evidence within his reach, but had generally not called the person cognizant of the fact which he proposed to prove, but some one who heard, perhaps at second hand,

the declarations of such person. The minority opposed the admission of the declarations of third persons, except in the case of the declarations of voters. In that case they were willing to receive them "whenever they constituted a part of the act of voting, or were offered in corroboration of declarations made in reference thereto."

843. The case of Blair v. Barrett, continued.

The reports of the census taken f or a city directory, produced from the archives of the city and proven by the takers, were admitted as prima facie evidence as to qualifications of voters.

Riots at the polls, even involving election officers, were not given weight except where contributing to impeach the integrity of unsworn election officers.

An ex parte deposition, tending to show that certain election officers had been sworn, was not admitted.

There being no doubt as to the intention of voters, the House declined to reject ballots on which the designations of the offices were confused.

(*c*) On one kind of evidence admitted by the majority of the committee a sharp issue was joined. The city census of St. Louis had not only enumerated the inhabitants, but included various statistical matter, such as nationality, length of residence, etc.

It was to the evidence which the reports of these census takers disclosed that the sitting Member strenuously objected. First, because under no circumstances could they be evidence of facts which they purport to contain; and, secondly, because of the manner of bringing that evidence before the committee.

The committee answer, that, so far as the census takers themselves were witnesses, testifying to the facts contained in their report obtained by themselves, which was the case in very many instances in which this kind of testimony was offered, it is the ordinary case of men making memoranda, or writing down what they know, and then coming into court and testifying to the facts thus acquired, refreshing their memory from the paper thus made out by them. Nor is there any objection to others comparing the poll books with those memoranda thus verified, and testifying to the result of the comparison. But these reports of the census takers, now in the archives of the city, are official documents, and are prima facie evidence of the facts they contain. They are like the land lists of Virginia, which are prima facie evidence that the men whose names are in them, purporting to be landowners, were voters (see Robert Porterfield *v.* William McCoy, Contested Election Cases, p. 267; George Loyall *v.* Thoma Newton, ibid., p. 520); or the list of taxables in Pennsylvania, which were used as evidence for the same purpose in the case of Mann *v.* Cassidy, before referred to, and votes of men not found on these lists rejected. And the poll books are always prima facie evidence, both of the fact that a man has voted and of the qualification of the voter, without evidence to rebut it stand as the fact. (See Porterfield *v.* McCoy, Contested Election Cases, p. 267, and First Peckwell on Contested Elections, English, p. 208, and Second Peckwell, p. 270.)

Nor is there any well-grounded objection to the manner of producing this testimony before the committee; so far as it was brought before the committee by the census taker himself, when testifying to the facts contained in his report, the objection has been already sufficiently answered. And all the evidence so introduced has been from men swearing that the paper exhibited by them is an exact copy pro tanto of the census return. In some instances the commissioner taking the deposition has annexed the identical paper thus sworn to the deposition, and in others he has himself instead written out their contents in the answer of the witness. These extracts from the reports of the census takers, used by the committee, thus become pro tanto examined copies. And this is one method of producing copies laid down in the elementary books. (See Greenleaf on Evidence, Ist vol., secs. 483, 484; 1 Phillips on Evidence, p. 432.) In the case of Vallandigham *v.* Campbell, decided in the last Congress, the secretary of state examined the contents of the returns from the several counties composing the Third Congressional district of Ohio, computed an abstract of them all, and then certified,

under his official seal, not a copy of any record return on file in his office, but the abstract, which had been the result of his own examination of the contents of another paper or papers, and that certified abstract was used as evidence. This was carrying this point much further than the admission of the evidence here offered. The sitting Member has also resorted for evidence, both in challenging votes and in rebutting testimony offered by contestant on other points, to this very census, to the introduction of which he objected. The committee, for the foregoing reasons, admitted the testimony, giving to it such weight as its own intrinsic merit and other corroborative testimony in the case, in their opinion entitled it.

The minority of the committee assailed this testimony at length. The census takers had no right to inquire as to nativity and residence and all the information which they received must be voluntary. Because the name of a voter was not found on the census lists was not sufficient reason for his disqualification. What evidence was there to identify the voter as the bearer of the name on the list?

(*d*) As to riot as a reason for rejecting the votes of a precinct, the minority contended that a mere fight or series of fights, even if the election officers should be involved therein, was no ground for throwing out the vote of the precinct. There must be an organized, concerted design to intimidate and overawe, in order to justify the disfranchisement of the whole precinct. The minority cite in view of this contention the cases of Trigg *v.* Preston and Biddle *v.* Wing.

The majority of the committee had not laid stress on the riotous disturbances, except as they had occurred in precincts where the election officers were not sworn, and where they contributed to impeach the integrity of de facto officers.

(*e*) The majority of the committee declined to admit an ex parte affidavit, presented by the sitting Member forty days after the parties had been fully heard, and tending to show that certain judges were actually sworn. The disqualification of these judges had been among the grounds of the contest and there had been opportunity to examine witnesses on the point.

(*f*) The committee counted certain ballots thrown out by the judges of election which were headed "For Congress, Francis P. Blair;" then followed "For the State Senate ————————;" then right over the list of candidates for representatives to the State legislature was, in large letters, "For Representatives for Congress," followed by 13 names. The committee having no doubts that the votes were intended for Mr. Blair, counted them, following the rule of Turner *v.* Baylies.

On June 5, 6, and 8,[1] the report was considered at length by the House, and on the latter day the House, by a vote of 94 yeas to 92 nays agreed to the resolution declaring Mr. Barrett, the sitting Member, not entitled to the seat.

Then, by a vote of yeas 93, nays 91, the House agreed to the resolution declaring Mr. Blair, the contestant, elected and entitled to the seat.

844. The Senate election case of James Harlan in the Thirty-fourth Congress.

In 1857 the Senate declined-to seat a claimant elected by a majority of all the members of the State legislature but not by a joint session of the two Houses.

A legislature having proceeded without objection to elect a Senator, failure to comply with requirements of a directory State law did not vitiate the election.

[1] Journal, pp. 1010, 1014, 1034–1038; Globe, pp. 2645, 2678, 2761.

On January 12, 1857,[1] after a long debate, the Senate by a vote of yeas 28, nays 18, declared James Harlan not entitled to his seat as a Senator from Iowa. This action was taken on the recommendation of the Committee on the Judiciary. This was a case of involving a construction of the meaning of the word "legislature" in that clause of the Constitution providing for the election of the United States Senators. The joint session of the two houses of the Iowa legislature had failed to elect; but finally an election was effected by the House of Representatives in conjunction with certain Members of the Senate. A quorum of the Senate was not present, but enough members of the legislature voted for Mr. Harlan to give him a majority of the whole number of the members of the general assembly. The question therefore arose as to whether the term "legislature" meant the individual members or the bodies composing it. After long debate the Senate decided as above recorded.[2]

[1] Third session Thirty-fourth Congress, Globe, pp. 112, 221, 248, 260, 287, 299; 1 Bartlett, p. 621; Senate Election Cases, Sen. Doc. No. 11, special session Fifty-eighth Congress, p. 235.

[2] On March 11, 1857, third session Thirty-Fourth Congress, Appendix of Globe, pp. 387, 391; 1 Bartlett, p. 627) the Senate Committee on the Judiciary reported on certain charges of irregularities in the election of Mr. Simon Cameron, of Pennsylvania. One of these irregularities is thus disposed of by the report: "It appears from the journal of the Senate that the appointment of a teller and the nomination of candidates, and the communication to the other house of the appointment and nomination so made, all took place on the day of the election, instead of one day previous to the election, as required by the law of the State; but your committee regard this provision of law as purely directory in its nature, and are of opinion that a failure to comply with this formality would under no circumstances suffice to vitiate as election otherwise legal and valid; but where, as in the present case, both houses proceeded without objection from any source to perform their constitutional duty of electing a Senator, the necessity of complying with any particular forms required by law may fairly be considered as waived by common consent, and it is entirely too late, after the result of the voting has been ascertained, to raise a question as to the mode of proceeding." On March 13 the report, which contained other features, was debated and agreed to without division. The debate was on other features.